85-379 (1)

No. -

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

OHIO NEW AND REBUILT PARTS, INC. and/or MEL'S BATTERY, INC., CANTON HEALTH CARE CENTER, INC. and COLONIAL GARDENS CARE CENTER, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Civil Service Reform Act of 1978, 5 U.S.C. Sec. 2301, et seq., by virtue of those provisions known as the "Senior Executive Service," 5 U.S.C. Sec. 3131, et seq, on its face, or as applied to Regional Directors of the National Labor Relations Board, violate the Due Process and Equal Protection Guarantees of the Fifth Amendment to the United States Constitution, by injecting substantial personal, financial interests, and other irrelevant and impermissible interests, into the administrative and enforcement processes engaged in by the United States of America through the National Labor Relations Board, by linking the pay of Regional Directors to their performance of both "quasi-judicial"

and "administrative prosecutorial" functions in their administration of the National Labor Relations Act, 29 U.S.C. Sec. 151, et seq.

2. Did the United States Court of Appeals for the Sixth Circuit, in a case of first impression among the United States Courts of Appeals, err in upholding the constitutionality of the Senior Executive Service, where no factual record existed before the Court of Appeals concerning the Senior Executive Service, because the National Labor Relations Board refused the Petitioners an opportunity to develop a record concerning the unconstitutionality of the Senior Executive Service.

PARTIES

The Parties to this matter in the United States Court of Appeals for the Sixth Circuit were:

(1) Ohio New and Rebuilt Parts, Inc. and/or Mel's Battery, Inc.;

(2) Canton Health Care Center, Inc.*;

(3) Colonial Gardens Care Center, Inc.*;

(4) The National Labor Relations Board.

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*Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, please be advised that the parent company of these corporations is American Health Care Centers, Inc., 661 Weber Drive, Wadsworth, Ohio 44281.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	1
PARTIES	3
TABLE OF CONTENTS	(i)
TABLE OF CASES AND AUTHORITIES	(iv)
OPINIONS BELOW	4
JURISDICTIONAL STATEMENT	4
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS MATTER	5
STATEMENT OF THE CASE	5
The C.S.R.A.	7
The S.E.S	9
The Compensation Scheme Of The S.E.S.	9
The Application Of The S.E.S. To Regional Directors	13
ARGUMENT	17
POINT I. SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING A WRIT OF CERTIORARI SINCE THE SENIOR EXECUTIVE SERVICE AFFECTS THE ENTIRE NATION	17
POINT II. THE COURT OF APPEALS DECISION CONFLICTS WITH ALL SUPREME COURT PRECEDENT GOVERNING RISK OF BIAS	24

TABLE OF CONTENTS (continued)

Pages

A. The Supreme Court's Standard Of Due Process In Administrative Proceedings..... 24

B. The S.E.S. Is Unconstitutional.. 28

1. The Unconstitutional Application of the Performance Review Criteria to Representation Proceedings 28

2. Regional Directors May "Control" Their Satisfaction of Median Goals in Representation Proceedings By Taking Particular Actions..... 31

3. The Unconstitutional Application of the Performance Criteria to Unfair Labor Practice Proceedings..... 33

4. Regional Directors May "Control" Their Satisfaction of Median Goals In Unfair Labor Practice Proceedings by Taking Particular Actions..... 35

5. The S.E.S. Mandate That Performance Awards Be Based Upon "Improvement" Progressively Heightens The Emphasis Placed on Impermissible Inducements..... 39

6. Other Actions Considered As Performance Criteria..... 39

TABLE OF CONTENTS (continued)

Pages

7. In Order For Regional Directors to Receive S.E.S. Performance Awards Subordinates Must Be Influenced By The Same Inducements..... 41

8. Other Impermissible Interests Created by the S.E.S. Which Induce Competition Under the Performance Criteria..... 43

C. The Court of Appeals Failed To Apply The Proper Standard To Determine The Constitutionality Of The S.E.S..... 46

POINT III. THE COURT OF APPEALS DECISION, BASED UPON AN INADEQUATE RECORD, JUSTIFIES THE SUPREME COURT'S EXERCISE OF ITS POWER OF SUPERVISION.. 52

CONCLUSION..... 59

TABLE OF CASES AND AUTHORITIES

Cases	Pages
Canton Health Care Center, Inc., 269 NLRB No. 35, 115 LRRM 1279 (1984)	4,54,55,56,58
Colonial Gardens Care Center, Inc., 268 NLRB No. 79 115 LRRM 1078 (1984)	4,56
Gibson v. Berryhill, 411 U.S. 564 (1973).	24,25,26,45,46,48,49,50
Marshall v. Jerrico, Inc., 446 U.S. 238, (1980)	20,25,27,46
N.L.R.B. v. Ohio New and Rebuilt Parts, Inc., et al., 760 F.2d 1443 (6th Cir. 1985)	4
Ohio New And Rebuilt Parts, Inc. and/or Mel' Battery, Inc. 267 NLRB No. 66, 114 LRRM 1053 (1983)	4,56
Schweiker v. McClure, 456 U.S. 188 (1982)	25,46,57
Tumey v. Ohio, 273 U.S. 510 (1927)	22,26,46,47,48,49
Ward v. Village of Monroeville, 409 U.S. 57 (1972)	22,26,46,47,48,49

Statutes and Regulations	Pages
5 U.S.C. Sec. 2301	1,5
5 U.S.C. Sec. 3131	1,5,9
5 U.S.C. Sec. 3132	10,11
5 U.S.C. Sec. 3592	44
5 U.S.C. Sec. 4312	13
5 U.S.C. Sec. 4313	13,39
5 U.S.C. Sec. 4314	44,45
5 U.S.C. Sec. 4507	11,12
5 U.S.C. Sec. 5318	13
5 U.S.C. Sec. 5381	10,11
5 U.S.C. Sec. 5383	12
5 U.S.C. Sec. 5384	11,13
28 U.S.C. Sec. 1254	4
29 U.S.C. Sec. 141	23
29 U.S.C. Sec. 151	2,5
29 U.S.C. Sec. 159	6,34
29 U.S.C. Sec. 160)	6,7,34
29 C.F.R. Sec. 101.2	5,7,34
29 C.F.R. Sec. 101.4	38
29 C.F.R. Sec. 101.7	6
29 C.F.R. Sec. 101.8	7
29 C.F.R. Sec. 101.20	42
29 C.F.R. Sec. 102.11	7,34
29 C.F.R. Sec. 102.25	7
29 C.F.R. Sec. 102.60	6
29 C.F.R. Sec. 102.63	42
29 C.F.R. Sec. 102.64	42

OPINIONS BELOW

Citations to the opinions regarding this matter delivered by the United States Court of Appeals for the Sixth Circuit and the National Labor Relations Board are:

(1) N.L.R.B. v. Ohio New and Rebuilt Parts, Inc., et al., 760 F.2d 1443 (6th Cir. 1985);
2) Ohio New & Rebuilt Parts, Inc. and Mel's Battery, Inc., 267 NLRB No. 66, 114 LRRM 1053(1983)
3) Canton Health Care Center, Inc., 269 NLRB No. 35, 115 LRRM 1279(1984);
4) Colonial Gardens Care Center, Inc., 268 NLRB No. 279, 115 LRRM 1078(1984).

JURISDICTIONAL STATEMENT

Judgment was entered in this matter by the United States Court of Appeals for the Sixth Circuit on April 30, 1985.

The jurisdiction of the United States Supreme Court to review the judgment of the United States Court of Appeals for the Sixth Circuit by writ of certiorari is

conferred by 28 U.S.C. Sec. 1254 (1) and 29 U.S.C. Sec. 160(e).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS MATTER

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall ...be deprived of life, liberty, or property, without due process of law ....

The pertinent provisions of the Civil Service Reform Act of 1978, 5 U.S.C Sec. 2301, et seq., termed "the Senior Executive Service," 5 U.S.C.Sec. 3131 et seq., the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., and the Rules and Regulations of The National Labor Relations Board, 29 C.F.R. Sec. 101.2 et seq., are set forth in the Appendix hereto.

STATEMENT OF THE CASE

This Petition concerns three separate proceedings before the National Labor

Relations Board ("N.L.R.B." or "Board") which were consolidated before the Court of Appeals.

The N.L.R.B. obtained enforcement from the Court below of three individual Orders directing the respective employers in each Board proceeding (collectively referred to in this Petition as the "Petitioners") to bargain with a labor organization, and directing other affirmative relief.[1]

Each of the N.L.R.B. proceedings involved a "Representation Case," followed by an "Unfair Labor Practice Case."[2]

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[1]Jurisdiction was conferred upon the Court of Appeals by 29 U.S.C. Sec. 160(e) and(f).

[2]Essentially, in each proceeding a labor organization filed a petition under 29 U.S.C. Sec. 159 (c)(1)(A)(i) and 29 C.F.R. Sec. 101.7 and 102.60(a), seeking an election to determine whether certain employees of the respective Petitioners desired the labor organization as their collective bargaining agent (referred to in this Petition generally as a "Representation

The C.S.R.A.

The C.S.R.A. became effective on

(footnote continued from previous page)

proceeding").

In each of the Representation proceedings the Regional Director for Region 8 of the N.L.R.B. (the "Regional Director") processed the petition, conducted the election, and certified the respective labor organization as having won the election, following some post-election proceedings.

Thereafter, each proceeding involved an Unfair Labor Practice Charge filed by the respective certified labor organization under 29 U.S.C. Sec. 160(a) and 29 C.F.R. Sec. 101.2 and 102.11, alleging, inter alia, that the respective Petitioner was refusing to bargain with the labor organization (referred to in this Petition generally as an "Unfair Labor Practice proceeding").

In each of the Unfair Labor Practice proceedings the Regional Director issued a Complaint, pursuant to 29 U.S.C. Sec. 160(b) and 29 C.F.R. Sec. 101.8 and 102.25, which subsequently was found by the Board to be meritorious, resulting in the issuance of an Order (in one proceeding following a hearing before an Administrative Law Judge, and in the other two proceedings following a Motion for Summary Judgment filed by the Regional Director) requiring, inter alia, that the respective Petitioner bargain with the respective labor organization.

October 13, 1978, and was passed by the Congress by a majority of 385 to 10 in the House of Representatives and by a majority of 87 to 1 in the U.S. Senate. (S. Res. 2640, 95th Cong., 2d Sess., 124 Cong. Rec. 134 (1978); H.R. Res. 11280, 95th Cong., 2d Sess., 124 Cong. Rec. 142 (1978).

As stated by Dr. Alan K. Campbell, the former director of the Office of Personnel Management at the time of its enactment, "the [C.S.R.A.] replaces an ineffective inflexible system which had existed for nearly 100 years." ("Statement of Dr. Alan K. Campbell, Director, U.S. Office of Personnel Management Concerning Limitations on Permanent Bonuses for Members of the Senior Executive Service" dated June 18, 1980 (the "June 18 Campbell Statement")).

The C.S.R.A. was enacted by the Congress as "an important step toward making the Government ... more accountable

to the American People." (Senate Report No. 94-969, 1978 U.S. Code Cong. & Ad. News 2726).

THE S.E.S.

The Senior Executive Service, 5 U.S.C. Sec. 3131, et seq., became effective on July 13, 1979.

As reported by the Office of Personnel Management in a news release dated July 22, 1980, "President [Carter] called the [S.E.S.] the cornerstone of his civil service reform efforts."

As stated by Dr. Campbell, the objective of the S.E.S. is "to link pay to performance, the proven and effective practice followed in the private sector." (June 18 Campbell Statement, supra.).

THE COMPENSATION SCHEME OF THE S.E.S.

The S.E.S. is a system of compensation, including base pay, awards and bonuses, for which certain high ranking positions within

the N.L.R.B., as well as similar positions in most Federal agencies, are eligible, with certain exceptions. Most notable among the exceptions to coverage of the S.E.S. are all members of the Judicial Branch of the government and all Administrative Law Judge positions within any of the Federal agencies covered. (5 U.S.C. Sec. 3132).

The S.E.S. is available for all positions within an agency above GS-15 of the General Schedule and below Level III of the Executive Schedule, or their equivalents, in which an employee exercises important policy-making or executive functions. (5 U.S.C. Sec. 5381 and 3132 (a)) (The persons occupying such positions are referred to in this Petition as "Senior Executives").

The positions within the N.L.R.B. covered by the S.E.S. include, among others, the Regional Directors for the 33

regions of the N.L.R.B. (5 U.S.C. Sec. 5381 and 3132(a); 45 Fed. Reg. 3797 (1980)).

The core of the S.E.S. is a scheme for compensating Senior Executives by various types of awards. These awards, which are provided for in 5 U.S.C. Sec. 5384 and 4507 are "Performance," "Meritorious Executive" and "Distinguished Executive" Awards, respectively.

The "Performance Awards," which are awarded on an annual basis in amounts of up to 20% of a Senior Executive's base pay, are the mainstay of the S.E.S. system. (5 U.S.C. Sec. 5384).

Although at the time of enactment of the S.E.S. each Agency was permitted to grant a "Performance Award" to 50% of its eligible Senior Executives each year, the percentage of Senior Executives eligible for a "Performance Award" within each

Agency was reduced from 50% to 25% for the fiscal year of the U.S.A. ended September 30, 1981, from 25% to 20% through fiscal year 1983, and back to 50% for fiscal year 1984. (5 U.S.C. Sec. 5383).

"Meritorious Executive" Awards in the amount of $10,000.00 may be awarded to up to 5% of the Senior Executives during any fiscal year of the United States for "sustained accomplishment." (5 U.S.C. Sec. 4507).

"Distinguished Executive" Awards in the amount of $20,000.00 may be awarded to up to 1% of the Senior Executives during any fiscal year of the United States for "sustained extraordinary accomplishment." (5 U.S.C. Sec. 4507).

Each Agency's awards are given on the basis of annual evaluations conducted by "Performance Review Boards" ("P.R.B.") established within the Agency to measure

the individual performance of the Senior Executives and that of the organizations they direct. (5 U.S.C. Sec. 4312 and 5384).

Each P.R.B. is responsible for adopting the statutory standards of evaluation for performance appraisals set forth in 5 U.S.C. Sec. 4313 to the particular Senior Executive positions evaluated in its Agency.

The combined maximum compensation available to any Senior Executive as a result of base pay, "Performance Awards," and other awards made available by the S.E.S., is $82,900.00. (5 U.S.C. Sec. 5318).

THE APPLICATION OF THE S.E.S. TO REGIONAL DIRECTORS

The key to an understanding of how a Regional Director acquires a financial interest in the manner in which he or she processes Representation proceedings and Unfair Labor Practice proceedings lies in

perceiving the inextricable relationship between (1) the amounts of awards over and above base pay which are available to the Regional Director under the S.E.S. and (2) the system applied by the P.R.B. within the N.L.R.B. for rating the performance of each Regional Director.

As noted above, "Performance Awards" may be given annually to 50% of the Senior Executives in each Agency, including Regional Directors, in amounts up to 20% of their base salary. In addition, each year up to 5% of the Senior Executives, including Regional Directors, may receive either the $10,000 Award of "Meritorious Executive", or up to 1% of the Senior Executives, including Regional Directors, may receive the $20,000 "Distinguished Executive" Award.

Five statutory "Performance Criteria" under the S.E.S. establish the basis upon which the P.R.B. within the N.L.R.B.

evaluates a Regional Director's performance. These criteria, as set forth in 5 U.S.C. Sec. 4313, include the following:

(1) Improvements in efficiency, productivity and work quality;

(2) Cost efficiency;

(3) Timeliness of performance;

(4) Success in meeting affirmative action goals; and

(5) Indications of the effectiveness, productivity and performance quality of the employees for whom the Senior Executive is responsible.

The crucial system applied by the P.R.B. within the N.L.R.B. for rating the performance of Regional Directors originally arose out of a May 14, 1979 Memorandum to the Regional Directors from John S. Irving, Esq., the General Counsel of the N.L.R.B. at the time of the passage of the S.E.S. (the "May 14 Irving Memorandum"), a copy of which appears in the Appendix.

In seeking to effectuate the statutory

"Performance Criteria," the May 14 Irving Memorandum called for rating the performance of Regional Directors on the basis of a "100 points maximum, plus 14 bonus points" system measured against certain critical elements of performance:[3]

(a) "Effectiveness and Efficiency of Performance";

(b) "Quality of Casehandling";

(c) "Achievement of Agency Programs and Objectives";

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[3]Although the N.L.R.B. Performance Criteria have been modified such that each of the critical elements of performance - which were assigned disproportionate percentages of a total of 100 points, with the possibility of bonus points under the system as originated - are now equally weighted at 25 points each, with no "bonus points" allowed, the elements of each of the criteria enumerated above have remained the same. See, Memorandum of William A. Lubbers, General Counsel, to all Regional Directors, dated April 13, 1982; Memorandum of William A. Lubbers, General Counsel, to all Regional Directors, dated February 20, 1981 (Appendix B to Sixth Circuit Opinion); Memorandum of John H. Fanning, Chairman to William A. Lubbers, General Counsel, dated February 13, 1981, copies of which are included in the Appendix.

(d) "Staff Relations including Developing and Training of Subordinates".

ARGUMENT

POINT I. SPECIAL AND IMPORTANT REASONS EXIST FOR GRANTING A WRIT OF CERTIORARI SINCE THE SENIOR EXECUTIVE SERVICE AFFECTS THE ENTIRE NATION

The Petitioner's urge that a Writ of Certiorari issue because special and important reasons implore certiorari.

As observed by the Sixth Circuit, "The constitutionality of the Senior Executive Service appears to be a question of first impression among the Courts of Appeal" (Slip Opinion, Page 14, App. 14).

As the Sixth Circuit further quoted from the Senate Report on the C.S.R.A., the S.E.S. controls the management of "the men and women who administer the programs that affect every person in the Nation." (Emphasis Added) (Slip Opinion, Page 6, App. 6).

Simply stated, the special and important quality of this case is that the

Petitioners are challenging the constitutionality of a statute which links the pay of all of the Regional Directors of the N.L.R.B. to the decisions they make every day, thereby affecting virtually every employer and labor organization in the Nation, as well as a vast proportion of the public.

Because the S.E.S. mandates the compensation not only for Regional Directors of the N.L.R.B., but for all Federal Managers who perform "quasi-judicial" and "administrative prosecutorial" functions, the reach of this Petition incidentally pervades the daily operations of the entire Executive Branch of the United States Government.

Thus, the possible temptation of bias created by the S.E.S. compensation scheme does not end with the Regional Directors of the Board; it broadly applies to nearly

8,000 of the highest-ranking Federal Managers, including all who are charged with the sensitive responsibility of overseeing proceedings in every Federal regulatory agency in the country.

Whereas this Court has seen fit before to accept other landmark cases in the realm of potential taint of official behavior, and indeed has noted in each case the paramount importance of protecting the public against unconstitutional risk of bias, none of the proceedings under scrutiny in those cases affected anywhere near the number of people touched by the S.E.S.

The impact of the Court's disposition of this Petition, when considered in terms of the sheer number of federal officials, or scope of federal activity, affected, proves to be unparalleled by prior Court opinions in this delicate area.

This Petition asserts a risk of bias nothing shy of a direct relationship between the pay of Regional Directors and the decisions they reach, where both "quasi-judicial" and "administrative prosecutorial" functions are being performed.

Thus, this Petition presents that very link missing in this Court's opinion in Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), where the Court remarked: "It is plain that no official's salary is affected by the levels of the penalties" and "No governmental offical stands to profit economically from vigorous enforcement of the child labor provisions of the Act. The salary of the assistant regional administrator is fixed by law." 446 U.S. 238, 245, 250.

This Petition represents the first occasion, and probably the only occasion,

when this precise constitutional issue will be before this Court, since never prior to the S.E.S. was the pay of Federal Officials linked directly to their performance of "quasi-judicial" and "administrative prosecutorial" functions, and since a denial of this Petition would most certainly operate, as precedent, to deter an examination of the biasing influences of the S.E.S. in the future.

The need is compelling for this Court to render its view at this moment concerning the bounds of risk of bias, now that the pay of Regional Directors is directly tied to the rulings they make, and, in all likelihood, will remain so indefinitely.

Since 1927 the Supreme Court has endeavored, persistently and consistently, to protect against even the appearance of bias in every form of legal proceeding.

Yet, it may fairly be said that never before has the need been as urgent for this Court to safeguard its judicial standards preventing bias.

Although the eradication of bias is of great importance even in cases where a single mayor is making a few decisions impacting upon the populace of a tiny municipality (see, Tumey v. Ohio, 273 U.S. 510 (1927), Ward v. Village of Monroeville, 409 U.S. 57 (1972)), here the entire complement of Regional Directors of the Board is administering the National Labor Relations Act across the land in the face of impermissible influences, in case after case, day after day.

During the fiscal year of 1984 alone, the Board docketed 8,571 Representation Petitions and 34,855 Unfair Labor Practice Charges (118 Lab. Rel. Rep. (BNA) 122), all of which were processed in the first

instance by a Regional Director.

The "special" and "important" nature of this Petition is certain and clear, given its objective of maintaining impartiality in the official conduct of the Nation's chief promoter of "the full flow of commerce" and principal guardian of "the rights of the public in connection with labor disputes affecting commerce," 29 U.S.C. Sec 141(b).

The Petitioners by this Petition are endeavoring to protect this Court's very own standard prohibiting risk of bias in legal proceedings.

The Petitioners respectfully plead for an exercise of this Court's power of supervision over the federal courts and regulatory agencies, to review this most important application of its standards to prevent bias in "quasi-judicial" and/or "administrative prosecutorial" proceedings.

The Petitioners further submit that a denial of this Petition would result in disruptive confusion over the true content of the standard enunciated by this Court in Gibson v. Berryhill, 411 U.S. 564 (1973), since the ad hoc opinion of the Sixth Circuit ignoring that authority, rather than the well-reasoned opinions of this Court, then undoubtedly would serve - at least in proceedings before the N.L.R.B., but most probably as regards every agency of the Federal Government - as the touchstone for determining risk of bias whenever "quasi-judicial" and "administrative prosecutorial" functions are performed by Federal Officials.

POINT II. THE COURT OF APPEALS DECISION CONFLICTS WITH ALL SUPREME COURT PRECEDENT GOVERNING RISK OF BIAS

A. The Supreme Court's Standard Of Due Process In Administrative Proceedings

"The Due Process Clause entitles a

person to an impartial and disinterested tribunal ...[to prevent] unjustified or mistaken deprivations and [to promote] participation and dialogue by affected individuals in the decision-making process." Marshall v. Jerrico, Inc., supra. Accord: Schweiker v. McClure, 456 U.S. 188 (1982).

These precepts apply not only in the context of civil and criminal cases, but

> "[m]ost of the law concerning disqualification because of interest applies with equal force to ... administrative adjudicators." Gibson v. Berryhill, supra, quoting K. Davis, Administrative Law Text Sec. 12.04, p. 250 (1972).

As early as 1927, the United States Supreme Court recognized that any judicial proceeding in which a judge has a substantial pecuniary interest in the matters before him, to the extent that such interest "would offer a possible temptation to the average man sitting as a judge" to

reach a result independently of the merits of the positions presented to him, is unconstitutional. Tumey v. Ohio, supra. (Emphasis added). Accord: Ward v. Village of Monroeville, supra.

Likewise, in Gibson v. Berryhill, supra, the Court held that an administrative board of optometrists composed solely of optometrists in private practice for their own account was constitutionally disqualified from hearing "unlawful practice" charges against other optometrists who were employees of business establishments, since the result of such hearings "would possibly redound to the personal benefit of members of the [b]oard." 411 U.S. at 578. (Emphasis added). The Supreme Court in Gibson affirmed and quoted the lower court's formulation of the test for bias in administrative "quasi-judicial" proceedings:

> "the injury was not whether the [administrative board] members were actually biased but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him".

411 U.S. at 571. (Emphasis added).

Petitioners argued below that the precise governing standard is not whether the Regional Directors are actually biased in their conduct of Representation proceedings or Unfair Labor Practice proceedings by reason of the S.E.S. scheme of awards and bonuses, but whether, in the natural course of events there is an indication of a possible temptation to an average person acting as a Regional Director to process such proceedings with bias for or against any issue presented.

As the Supreme Court recently pointed out in Marshall v. Jerrico, supra, "'justice must satisfy the appearance of justice'... and this 'stringent rule may

sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties...'" 446 U.S. at 243. (Citation omitted) (Emphasis added).

The Petitioners submit that an analysis of the provisions of the S.E.S., as well as of their application to the N.L.R.B., compels the conclusion that, at the very least, the "appearance of justice" is not attained, and that, certainly, the impermissible interests provided by the S.E.S. are so substantial as to warrant a Writ of Certiorari.

B. The S.E.S. Is Unconstitutional

1. The Unconstitutional Application of the Performance Review Criteria to Representation Proceedings

According to the May 14 Irving Memorandum, in the processing of Representation Petitions, the critical elements of "Effectiveness and Efficiency

of Performance" considered are:

(a) frequency of approval of "Election Agreement";
(b) frequency of issuance of "Regional Directors Decisions Pre-Election)";
(c) the conduct of "Elections"; and
(d) the conduct of "Post-Election Proceedings".

Whether the Regional Director earns the maximum points that can be won for the various actions which may be taken with regard to a Representation petition depends upon the period of "median days" within which each such action is taken. The Regional Director earns the greatest number of points for actions taken within the least period of "median days." No points are earned where the action if taken beyond a maximum period of "median days."

It is readily apparent, then, that for the Regional Director to earn a "Performance Award," not only must certain actions with regard to Representation Petitions -- for example, issuing a

Decision and Direction of Election -- be taken, but such actions must be taken as expeditiously as possible.

The inducement to take such actions as expeditiously as possible is compounded where an Election is conducted in accordance with a Decision and Direction of Election.

Since the maximum points for issuing Decisions and Directions of Election is only available if the action is taken within a median of 45 days from the filing of a Petition, and the maximum points for conducting Elections are earned only where the "median days" period from the filing of a Petition to the date of the Election is within 50 days, and because the N.L.R.B. Case Handling Manual states in Sec. 11302.1 that a Regional Director may not conduct an Election within 25 days following a Decision and Direction of Election, a

strong inducement exists to issue a Decision and Direction of Election within a period of 24 days after the filing of a Petition.

Obviously, this inducement exists because the Regional Director is clearly interested in winning the greatest number of points available under the N.L.R.B. Performance Criteria, so that the chances of winning thousands of dollars are improved.

2. Regional Directors May "Control" Their Satisfaction of Median Goals in Representation Proceedings By Taking Particular Actions

The N.L.R.B. Performance Criteria also offer a possible temptation to Regional Directors to control the "median days" period within which Elections are conducted so that the statistical "median days" period is less than 50.

In order to achieve such a record the

Regional Director could tactically (a) issue Decisions and Directions of Elections and conduct Elections in some cases and (b) issue Decisions Dismissing Petitions in other cases -- in each case to assure obtaining points in each category of official action and to secure an overall record of satisfactory "median days".

In a case where a period of, for example, 45 days has elapsed from the filing of a Petition, the Regional Director would be tempted to issue a Decision Dismissing Petition in order to earn the maximum points for issuance of "Regional Director Decisions (Pre-Election)," rather than issue a Decision and Direction of Election and be unable thereafter, in view of the Case Handling Manual requirements, to conduct the Election within 50 days from the filing of the Petition.

Further, with regard to a case where a

period of less than 24 days has elapsed from the filing of a Petition, the Regional Director might be tempted to issue a Decision and Direction of Election in order to earn points for both issuing "Pre-election Decisions" within a "median" of 45 days and for conducting "Elections" within a "median days" period of 50 days, rather than issue a Decision Dismissing Petition and consequently earn fewer points for issuing a "Pre-Election Decision."

3. The Unconstitutional Application of the Performance Criteria to Unfair Labor Practice Proceedings

As is the case with the processing of Representation petitions, the financial interests propounded by the Performance Criteria are no less apparent when considered in the realm of Unfair Labor Practice proceedings.

In this regard, according to the May 14 Irving Memorandum, with regard to Unfair

Labor Practice Charges filed under 29 U.S.C. Sec. 160(a) and 29 C.F.R. Sec. 101.2 and 102.11, a Regional Director can earn points for issuing "Complaints," for the "Percentage of 45-day Cases Within Control," for the "Percentage of Unexcused Average Compliance Cases Within Control," and for "Settlement Agreements."

Whether a Regional Director earns the maximum points available for the various actions taken with regard to Unfair Labor Practice Charges depends upon the period of "median days" within which the respective action is taken, such that a Regional Director earns the greatest number of points where the action is taken within the least period of "median days", and no points where the action is taken beyond a maximum period of "median days".

Further, whether a Regional Director earns the maximum points available for the

various actions taken with regard to Unfair Labor Practice Charges also depends upon a "percent of merit" factor, such that a Regional Director earns the greatest number of points where the action is taken in cases where the "percent of merit" factor is the highest, and no points where the action is taken in cases where the "percent of merit" factor is below a minimum.

In order for a Regional Director to earn a "Performance Award", the Regional Director must take the various actions with regard to Unfair Labor Practice Charges - for example, must issue a Complaint - and must take the respective action as expeditiously as possible and with regard to the highest "percent of merit" factor.

4. Regional Directors May "Control" Their Satisfaction Of Median Goals In Unfair Labor Practice Proceedings By Taking Particular Actions

The inducement for a Regional Director to take the various actions with regard to Unfair Labor Practice charges is compounded, since the maximum points for "Settlement Agreements" may be earned by a Regional Director only in cases where Complaints have issued for which the Regional Director also earns the maximum points by approaching, or surpassing, the "median days" goals prescribed for each action.

In addition, the inducement for a Regional Director to take various actions with regard to Unfair Labor Practice Charges as expeditiously as possible is further compounded by the points which can be earned by a Regional Director depending upon the "Percentage of 45 day Cases Within [the Regional Director's] Control."

Since a Regional Director can earn maximum points where the "Percentage of 45-day Cases Within Control" is less than

2%, and because the percentage depends upon the "45-day Cases" within a Regional Director's control, a Regional Director has an inducement to either dismiss an Unfair Labor Practice Charge or issue a Complaint within a period of 45 days after the filing of the Unfair Labor Practice Charge.

Moreover, inasmuch as a Regional Director may earn, under the critical element of "Effectiveness and Efficiency of Performance," points for issuing "Complaints," and for "Percentage of 45-day Cases Within Control," and, in order to control the "median days" period of 45 days within which to issue Complaints, and as concerns "Percentage of 45-day Cases Within Control", the N.L.R.B. Performance Criteria presents an inducement to a Regional Director to issue Complaints in some cases and to dismiss Unfair Labor Practice Charges in other cases.

In a case where a period of, for example, more than 45 days has elapsed from the filing of an Unfair Labor Practice Charge, a Regional Director would be tempted to dismiss the Unfair Labor Practice Charge, pursuant to 29 C.F.R. Sec. 101.3 through 101.6, rather than issue a Complaint, in order to control the "median days" period 45 days within which to issue Complaints, and as concerns "Percentage of 45-day Cases Within Control."

In a case where a period of less than 45 days has elapsed from the filing of an Unfair Labor Practice Charge, a Regional Director would be tempted to issue a Complaint in order to earn the maximum points both for issuing Complaints within a "median days" period of 45 days, and maintaining less than 2% of 45-days cases within the Regional Director's control.

5. The S.E.S. Mandate That Performance Awards Be Based Upon "Improvement" Progressively Heightens The Emphasis Placed On Impermissible Inducements

The inducement for a Regional Director to take various actions with regards to Representation Petitions and Unfair Labor Practice Charges, and to take the actions as expeditiously as possible, is compounded where a Regional Director has received a "Performance Award" in a previous fiscal year of the U.S.A., since the "Performance Criteria" are defined in terms of "improvements", 5 U.S.C. Sec. 4313(1), so as to require a reduction in the respective period of "median days" in each progressive fiscal year of the U.S.A. in order for a Regional Director to merit a "Performance Award".

6. Other Actions Considered As Performance Criteria

With regard to the critical element of "Achievement of Agency Programs and

Objectives", a Regional Director can earn maximum points for support of N.L.R.B. programs, including support for the "Officer-of-the-Day Program", which is a program, that accounts, in large part, for the total quantity of Representation Petitions and of Unfair Labor Practice Charges docketed.

The element of "Achievement of Agency Programs and Objectives", including support of the "Officer-of-the-Day Program", presents an inducement to a Regional Director to docket some Representation Petitions and Unfair Labor Practice Charges, in order to control the "median days" and "percent of merit" factors of the critical element of "Effectiveness and Efficiency of Performance."

Thus, for example, the N.L.R.B. Performance Criteria present an inducement to a Regional Director to docket

Representation petitions with regard to which the N.L.R.B. lacks jurisdiction, in order that the Regional Director may dismiss the Representation Petition within a "median days" period of 45 days, so as to earn points for "Regional Director Decisions (Pre-election)."

Similarly, the N.L.R.B. Performance Criteria present an inducement to a Regional Director to docket Unfair Labor Practice Charges with regard to which, for example, the Unfair Labor Practice Charges plainly lack merit, in order that the Regional Director may dismiss the Unfair Labor Practice Charges within a "median days" period of 45 days, so as to earn points for maintaining less than 2% of 45-day cases.

7. In Order For Regional Directors to Receive S.E.S. Performance Awards Subordinates Must Be Influenced By The Same Inducements

Because the eligibility of a Regional Director for a "Performance Award" depends, in part upon "the effectiveness, productivity and performance quality of the employees for whom the (Regional Director) is responsible," and since a Hearing Officer designated by the Regional Director to conduct Hearings is an "employee for whom the [Regional Director] is responsible," the Regional Director has vested interests in the expediency with which a Hearing Officer concludes a Hearing conducted pursuant to 29 C.F.R. Sec. 102.64(a) and 101.20(c).

Because of the N.L.R.B. Performance Criteria, and because the eligibility of a Regional Director for a "Performance Award" depends similarly upon the employees for whom the Regional Director is responsible, and since the "Member of the Field Staff" designated by the Regional Director to

investigate an Unfair Labor Practice Charge is an "employee for whom the [Regional Director] is responsible", the Regional Director has vested interests in the expediency with which the "Member of the Field Staff" concludes an investigation.

In the instant N.L.R.B. proceedings, Petitioners bore the brunt of the vested interests which the Regional Director had in the manner in which Hearing Officers conducted Hearings, the expediency with which the "Members of the Field Staff" concluded investigations, and the manner in which other subordinates took official actions.

8. Other Impermissible Interests Created by the S.E.S. Which Induce Competition Under the Performance Criteria

In addition to the rewards available to Regional Directors who compete successfully with colleagues, the S.E.S.

provides "negative" inducements for Regional Directors to demonstrate results which satisfy the Performance Criteria.

In this regard, 5 U.S.C. Sec. 4314 provides that each performance appraisal system shall provide for annual summary ratings of the levels of performance as follows:

(i) One or more fully successful levels

(ii) A minimally satisfactory level; and

(iii) An unsatisfactory level.

Regional Directors may be removed from the S.E.S. upon the receipt of <u>one</u> "less than fully successful executive performance" rating (5 U.S.C. Sec. 3592 <u>et seq.</u>), and <u>must</u> be removed if they receive two "unsatisfactory" ratings in any period of five consecutive years (5 U.S.C. Sec. 4314(b)(3)) or two "less than fully successful" ratings in any period of three

consecutive years. (5 U.S.C. Sec. 4314(b)(4)).

In addition, a Regional Director who receives a single "unsatisfactory" rating must be reassigned or transferred within the S.E.S., or, in some cases, removed from the S.E.S.

Regional Directors who are removed from their positions because of a "less than fully successful executive performance" may not be reinstated to any S.E.S. position.

Unlike federal employees who are not part of the S.E.S., Regional Directors may be reassigned involuntarily to other positions within the S.E.S. Moreover, Regional Directors would not have the right to challenge their removal to the Merit Systems Protection Board.

Thus, it is clear that Senior Executives have not only the "carrot" of

awards, but the "stick" of strict removal and reassignment provisions, to consider in striving to succeed under the S.E.S.

C. The Court Of Appeals Failed To Apply The Proper Standard To Determine The Constitutionality Of The S.E.S.

The Court of Appeals failed to articulate the standard by which it gauged the claims of risk of bias made by the Petitioners, unless it can be said to have done so by its reference to the Petitioners' statement of the controlling principles, at Page 3 of the Slip Opinion, which, itself, is drawn from this Court's opinions in Schweiker v. McClure, supra, Marshall v. Jerrico, supra, Gibson v. Berryhill, supra, Ward v. Village of Monroeville, supra, and Tumey v. Ohio, supra.

Yet, the Court of Appeals, in any event, failed to correctly apply existing

precedent.

Instead, the Court of Appeals faulted the Petitioners for claiming that the Regional Directors have only a possible financial stake in their decisions, while relying upon cases in which quasi-judicial or judicial officers had a direct financial interest effected by their decisions. (Slip Opinion, Page 15, App. 15).

Actually, it appears that the Court of Appeals' decision is reached in one sentence, following a comparative citation to Tumey v. Ohio, supra, and Ward v. Village of Monroeville, supra, as follows: "There is no showing that Regional Directors have any comparable possibility of a financial stake in their decisions". (Slip Opinion, Page 16, App. 16).

Assuming the above represented an accurate application of the appropriate standard, which it plainly does not, the

Court ignored anyway the Petitioner's chief reliance upon this Court's decision in Gibson v. Berryhill, supra, as stating the controlling standard.

Thus, the Court of Appeals cited Gibson only for the proposition that the burden is upon the Petitioners to establish a disqualifying interest (Slip Opinion, Pages 14-15, App. 14-15).

The Court articulated a difference in the circumstances involved in the Petitioners' appeal, from those of Tumey and Ward, by drawing a contrast between a "direct financial interest" and the mere possibility of receiving "performance awards." In so reasoning, the Court failed even to discuss Gibson, let alone distinguish this controlling precedent, even though this authority is squarely at odds with the Court's reasoning.

In this regard, the Regional Directors

have a far more imposing "financial stake" than that possessed by any one of the optometrists comprising the administrative board in Gibson.

Not one optometrist in Gibson could be certain that, by finding a defendant optometrist guilty of an "unlawful practice", such decision would redound to his or her personal benefit in the form of a fee from a former patient of the defendant optometrist. For that matter, the actions of a member of the administrative board would be determinative only in concert with other members of the administrative board, unlike Regional Directors of the Board who are authorized to function autonomously.

Moreover, the optometrists in Gibson could hardly identify, let alone quantify, the "financial reward" obtainable for any single license revocation.

To the contrary, a Regional Director can both identify, and quantify, his or her "financial stake" in reaching any decision, inasmuch as the pecuniary interest is specifically provided for by statute.

Even in the face of far less personal pecuniary interests than those attendant to the Regional Directors in the case at bar, this Court nonetheless held that the individual members of the administrative board of optometrists were constitutionally disqualified, since the result of their proceedings "could possibly redound to the personal benefit of members of the Board." 411 U.S. at 578. (Emphasis added).

The Petitioners submit that the error of the Court of Appeals is to be found in the fact that the Court erroneously shifted its attention from the question of whether Regional Directors are subject to an

impermissible pecuniary interest, to whether a Regional Director enjoyed the guarantee of reaping an award.

This, mistakenly, confuses the very point to the S.E.S. system - to wit, competition for rewards, and the attendant incentives which the S.E.S. was designed to promote.

The Petitioners submit that temptation is omnipresent under the S.E.S., since Regional Directors are exposed to the impermissible interests at all times, even though only the possibility exists that a given Regional Director might actually reap a financial benefit during any one fiscal year.

In any event, the impermissible pecuniary interests are only the "carrot" - the Court of Appeals remained totally silent as to the other impermissible interests injected by the S.E.S., such as

removal from the S.E.S. for poor performance, which represent the "stick," bringing their own pressures to bear upon the temptations of the S.E.S.

POINT III. THE COURT OF APPEALS DECISION, BASED UPON AN INADEQUATE RECORD, JUSTIFIES THE SUPREME COURT'S EXERCISE OF ITS POWER OF SUPERVISION

One of the reasons considered by the Court in determining whether to grant review on Writ of Certiorari is whether a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (Rule 17(a) of the Rules of the Supreme Court of the United States).

The Petitioners submit that, by deciding this matter without an adequate record before it, the Court of Appeals has

so far departed from the "accepted and usual course of judicial proceedings as to warrant the exercise of the Court's power of supervision."

In holding that "the record in the present case does not support the blanket allegation of respondents that the Board's appraisal system offers an incentive to Regional Directors to perform their duties with a bias toward outcomes that will enhance their opportunity to receive a performance award" (Slip Opinion, Pages 16-17, App. 16-17), the Court below based its ruling upon a record recognized to consist only of (1) the statutory provisions of the S.E.S., and (2) whatever "details as to the administration of the Senior Executive Service and the application of its performance appraisal system to Regional Directors" as could be "taken from the N.L.R.B. brief" filed with

the Court. (Slip Opinion, Pages 8-9, App. 8-9).

Although the Court of Appeals correctly noted that the burden of establishing a disqualifying interest rests on the Petitioners (Slip Opinion, Pages 14-15, App. 14-15), no factual record other than the S.E.S. statutory provisions existed before the Court of Appeals upon which the Petitioners could fairly rely.

Rather, the record cited by the Court was comprised merely of the S.E.S. statute, and sparse documentation selected by the N.L.R.B. for introduction, in the first instance, in its brief to the Appellate Court.

The Petitioners were not allowed any opportunity by the Board to develop a factual record concerning the application of the S.E.S. to the Regional Directors.

Most pointedly, during the

Representation Hearing in Canton Health Care Center, Inc., supra, the Hearing Officer stated that he would "...permit (the Employer) to raise the (S.E.S.) issue...," and then stated "...but I am not really going to litigate it." (T.[4] 6, lines 18-23)

In fact, a perusal of the transcript of the Representation Hearing before the Board in the Canton case demonstrates that the Hearing Officer repeated ad nauseum that he would not allow the Employer to litigate the S.E.S. issue in relation to the Petition, to the point where the Hearing Officer would not even allow an adjournment to permit service of subpoenas issued by

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[4] "T" followed by page and line numbers refers to the pages and lines of the Official Report of Proceedings Before the National Labor Relations Board, whose pertinent pages are included in the Appendix hereto.

him at the Hearing.[5]

Similarly, the Board summarily refused to pass upon the issue presented here in Ohio New and Rebuilt Parts, Inc., supra, and in Colonial Gardens Care Center, Inc., supra.

The Petitioners contend in the first instance that even given the state of the record, they met their burden of

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[5]Thus, the Hearing Officer stated: "I am not really going to litigate it. I can't litigate that." (T. 6, lines 20, 21); "This is not the proceeding to litigate such a question, you will do it some place else..." (T. 7, lines 3-4); "indicated that you could make a motion to dismiss the Petition based on that [the constitutional issue] ... It is something that you should have made" (T. 7, lines 6-11); "...[t]his is all in relation to that question that I am not going to litigate here -- I won't let you litigate?" (T. 9, lines 25, T. 10, lines 1,2): "We are not going to litigate anything here." (T. 10, lines 6,7); "...I don't believe that issue is one that can be litigated in this proceeding..." (T. 9, lines 21, 22).

establishing a disqualifying interest affecting the Regional Director - namely, the compensation scheme developed by the S.E.S. - even though they were deprived of any opportunity to develop a factual record before the N.L.R.B.

Thus, a bonus equating up to 20% of a Regional Director's pay, let alone lump sum awards of $10,000.00 or $20,000.00, constitute a "substantial" pecuniary interest, sufficient to raise the specter of bias.

However, as was noted by this Court in Schweiker v. McClure, supra, it could be probative, in considering the issue of possible bias in the performance of "quasi-judicial" and/or "administrative prosecutorial" functions, to take into account any evidence of "institutional or psychological" interests at play within the

proceeding in question. 456 U.S. at 192, Fn. 10.

Yet, the Petitioners were prevented at every stage of these proceedings from adducing such evidence.

Counsel for Petitioner Canton Health Care Center, Inc., stated to the Hearing Officer his desire to develop a "full and complete record on the operations of the Senior Executive Service" (T. 8, Lines 14-16). If allowed to develop a factual record, evidence could have been adduced bearing upon the S.E.S. issue, such as the following: Any proof of discontent by Regional Directors with the S.E.S. upon its inception, for fear that the competitive pay system it established would detract from their ability to function, and expert testimony concerning psychological tendencies to attain substantial bonuses.

Without benefit of a factual record on

the full import of the S.E.S., the Court of Appeals has issued a decision which - absent review by this Honorable Court - will serve as empty precedent regarding the substantial constitutional issues raised by the Petitioners.

CONCLUSION

WHEREFORE, in light of the exigent need for review of the significant questions at issue here, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

DATED: JULY 29, 1985

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AFFIDAVIT OF SERVICE OF PETITION FOR WRIT OF CERTIORARI AND APPENDIX

STATE OF NEW YORK,
COUNTY OF NEW YORK

I, Don T. Carmody, being duly sworn, say;

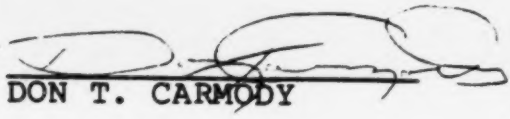
(1) I am not a party to the action, am over 18 years of age, and reside at 264 Thornridge Drive, Stamford, Connecticut 06903.

(2) In accordance with Rule 28 of the Rules of the Supreme Court of the United States, on Monday, July 29, 1985, I served the within Petition For Writ of Certiorari and Appendix to Petition for Writ of Certiorari by depositing true copies thereof in a United States Post Office, with first-class postage prepaid, upon the Clerk of the Supreme Court of the United States, and upon each of the following

persons at the last known address set forth after each name:

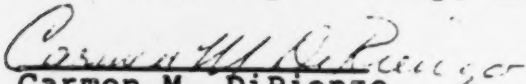
Frederick C. Havard, Esq.
Division Of Enforcement Litigation
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C. 20570

Solicitor General
United States Department Of Justice
Constitution Avenue
Washington, D.C. 20530



DON T. CARMODY

Sworn to before me
this 29th day of July, 1985



Carmen M. DiRienzo
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Term Expires: 3/30/87